CORRESPONDENCE.

VIRGINIA CASE OF FISHER v. S. A. L. REVIEWED IN THE LIGHT OF A RECENT DECISION OF THE SUPREME COURT OF THE UNITED STATES.

Editor Virginia Law Register:

In *Fisher* v. *S. A. L. Ry. Co.*, 102 Va. 363, our Court of Appeals held, as stated in the syllabus, that—

"A railroad company acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from the noises, jarring, and shaking of buildings, dust, and smoke incident to the running of trains; and that no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way."

The same question having since come before the Supreme Court of the United States, in *Muhlker* v. *Railway Co.*, that court, speaking through Mr. Justice McKenna, on April 10, 1905, announced a different conclusion. In that case Muhlker was the owner of a house and lot fronting on Park avenue, in New York city. At the time he acquired this property the defendant company was, and had been for many years previous thereto, operating a surface-grade steam railroad along said avenue. The company subsequently determined to elevate its tracks upon a trestle some thirty feet high, and this was accordingly done in pursuance of certain statutes and ordinances authorizing such action. As soon as trains began running on said trestle Muhlker found that his property had suffered serious injury by the change so made, in consequence of which large volumes of smoke, soot, and ashes from the trains were thrown into his premises. He thereupon filed a bill alleging these facts, charging that the said acts and doings of the defendant were "a continuous trespass upon the plaintiff's easements of light and air," praying for an injunction to stop the use by defendant of said trestle as aforesaid, and for the recovery of damages. There was no allegation of negligence either in the construction of said trestle or in the operation of trains upon same. Nevertheless, the court of first instance sustained plaintiff's bill, awarded the injunction, ordered the removal of the trestle, and gave damages in the sum of $4,400. Upon appeal this decree was reversed (173 N. Y. 549). Muhlker then took his case to the Supreme Court of the United States, where the New York Court of Appeals was itself in turn reversed, and the plaintiff's right of action distinctly affirmed.

Our Court of Appeals in the Fisher case quotes with approval (p. 367) what is said by Pollock on Torts, to the effect that "no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner;" and the same doctrine seems to have influenced the New York Court of Appeals. Counsel for Fisher insisted that this English doctrine was founded in the unlimited powers of the British Parliament, and

could have no proper place in our system of government. The Supreme Court of the United States now speaks as follows:

"We do not, therefore, solve the questions in this case by reference to the power of the state and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement the plaintiff urges the contract clause of the Constitution of the United States, and the Fourteenth Amendment."

No such protection can be invoked by an English landowner. Referring to the position held by the New York Court of Appeals, viz., that "the act of the railroad in occupying the viaduct was the act of the state," and that "it was the state, and not the railroads, who did the injury to plaintiff's property," the Supreme Court then uses this language:

"The answer need not be hesitating. The permission, or command of the state, can give no power to invade private rights, even for a public purpose, without payment of compensation. . . . . The public interest is made too much of. It is given an excessive, if not a false, quantity," etc.

And, finally, the Supreme Court expressly adopts as the law of this land what had been said in the Story case (90 N. Y.. 122), touching the right of property in light and air, viz.:

"That such easement was an interest in real estate and constituted property, within the meaning of the constitution of the state, and could not be taken for a public use without payment of a compensation;" and,

That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam, and smoke, and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking."

It was contended for the New York Railway Company that the Court of Appeals did not deny Muhlker's property rights; that the most important phase of those rights was that of access; that the plaintiff's premises were much more accessible after than before the change made by defendant in its roadway; and that any detriment to his light and air was more than compensated for by removing the surface tracks. Commenting upon this suggestion, the Supreme Court says:

"It is impossible for us to conceive of a city without streets, or any benefit in streets if the property abutting on them has not attached to it as an essential and Inviolable part easements of light and air as well as of access. There is something of mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the state, it is contended, can authorize dirt, cinders, and smoke from two hundred trains a day to be poured into the upper windows of his house."

This is unusually strong language to emanate from such a quarter. But was it not justified by the matter in hand?

There is nothing in principle to distinguish this case from the Fisher case. It is of no consequence that one trestle was built in the street while the other was erected on a lot belonging to the defendant. In either case the dumping of foreign substances upon, and polluting the atmosphere of, the adjacent premises must, according to the opinion of the Supreme Court of the United States, be regarded as an actionable trespass and *a taking of property* within the purview of our constitution. Every important case relied upon by counsel for the S. A. L., including that of *Meyer* v. *City af Richmond*, was cited in the New York case and considered by the Supreme Court. Most of them are referred to by Mr. Justice Holmes in his dissenting opinion.

Such is "the glorious uncertainty of the law." Well satisfied that Fisher's case was one of *damnum absque injuria*, our Court of Appeals would scarcely listen to any argument on the plaintiff's behalf; and yet the Supreme Court of the United States has said, in effect, that if Fisher had brought his case before them he might have obtained redress.

This is a striking illustration of the advantage enjoyed by a suitor who can afford to persevere unto the uttermost in the prosecution of his cause.

A. W. PATTERSON.

Richmond, Va., May 11, 1905.

THE ASSESSMENT OF LUMBER FOR TAXATION—VA. CODE 1904 (TAX BILL), P. 2192.

To the Editors of the Virginia Law Register:

By reference to Section 6, Schedule B, of the tax bill, approved April 6, 1903, it will appear that said section requires that the Commissioner of the Revenue list for taxation the aggregate value of *all felled timber*, cord-wood, mine-props, etc., which has been felled for sale by other than the owner of the land upon which it has been felled within twelve months preceding the first day of February of each year.

At the October term of the court, 1904, the A. L. Shepherd Lumber Company made application to the court to relieve it of an erroneous assessment for certain standing timber charged to it for the year 1903. It appeared from the testimony produced upon the application that the timber so charged for the year 1903 for taxation had been cut, sold and removed by the said company during the year 1902, and that the said company had paid the taxes on the standing timber for the said year 1902.

It was contended by the attorney for the commonwealth that the application should be denied because it was admitted that the applicant did not for the year 1903 list for taxation the timber felled by him within twelve months preceding the first day of February, 1903, as required by the said tax bill. It was contended by the said company that if they had listed for taxation the timber cut during the year 1902 that it would be paying double taxes, as it had paid the taxes for the said year 1902 on standing timber and disposed of the same before the first day of February, 1903.

It was further contended by the company that if it had had any of the lumber